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NO. 57068-4-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION I

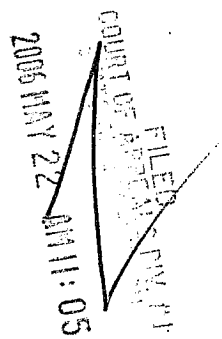
MICHAEL STEPHENS, on behalf of himself and all others similarly situated,

Respondent

v.

OMNI INSURANCE COMPANY, a foreign insurance company; and CREDIT CONTROL SERVICES, INC. d/b/a Credit Collection Services,

Appellants



REPLY BRIEF OF APPELLANT CREDIT CONTROL SERVICES, INC.

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I. INTRODUCTION

The facts set forth by Michael Stephens, and on which his legal reasoning is based, are entirely fabricated. He then embellishes his summary with a degree of inappropriate editorializing that fails to describe the actual circumstances surrounding this case.[1]

Stephens complains about receiving letters sent by Credit Control Services, Inc. ("CCS") that accurately detail a claim to reimbursement relating to an automobile accident that he caused. Significantly, these letters contain *entirely truthful content*. Stephens has not and cannot point to any evidence suggesting the contrary. Moreover, these letters were not sent out to any "unsuspecting" member of the general public. As Stephens knows now and knew at the time, he received the letters because he failed to provide proof of insurance as required by Washington law and then failed to make reimbursement for sums paid on his behalf to the victim of his automobile accident.

Contrary to Stephens' insistence, this case is about Washington insurance laws and insurers' established rights to seek recovery of payments that Washington law requires be made on behalf of uninsured motorists who have caused automobile accidents. This case is about the

[1] The same in appropriate tactics are also employed by counsel for Stephens on behalf of their other client in the *Panag v. Farmers and CCS* case (No. 56625-3-I) that has been linked to this case for purposes of appeal.

reasonable processes and procedures used by insurers and their agents to obtain recovery of those sums.

Rather than address these realities, Stephens is asking this Court to change completely a Washington law that was intended to benefit consumers. Stephens asks that this Court create a Consumer Protection Act ("CPA") cause of action for motorists who are in violation of the state's mandatory insurance laws. Such a cause of action would reward uninsured motorists with the chance to obtain a windfall of money damages. At the same time, such a cause of action would unfairly penalize compliant insurers by restricting their ability to collect sums appropriately paid on behalf of uninsured motorists. Stephens has not and cannot deny that the mandatory claims processing regulations were followed in this case. *See* WAC § 284-30 ("Unfair Claims Settlement Practices"). These well established procedures depend upon the use of licensed insurance adjusters and other means to expedite and simplify claims processing to avoid unnecessary and costly litigation in each instance. There is no requirement that insurers first seek a judicial determination of fault or liability. Indeed, the logistical difficulties in doing so would effectively bar compliant insurers from asserting their rightful claim to reimbursement.

The important purposes of the CPA referenced in legislation and interpreting caselaw are not served by the unlimited expansion of the CPA proposed by Stephens. To the contrary, the interests of Washington consumers would not be served if their statute were dramatically altered to benefit uninsured motorists who are decidedly *not* consumers of insurance. If the insurers of Washington consumer were effectively barred from recovering sums they were required to pay on behalf of uninsured motorists, it is Washington consumers who would certainly be made to suffer.

For the reasons discussed both herein and in CCS's Opening Brief, this Court must reverse the trial court's partial summary judgment order and dismiss Stephens' CPA claim as a matter of law.

II. SUMMARY OF RELEVANT FACTS

The description of events in Stephens' Response Brief is simply a creation by counsel rather than a recitation of actual facts.[2] The only true facts that were developed in the trial court record are detailed in CCS's

[2] The "Statement of the Case" set forth in Stephens' brief contains many factual allegations that 1) cannot be characterized as "[a] fair statement of the facts and procedure relevant to the issues presented for review, without argument" as required by RAP 10.3(4), and 2) lack the mandatory references to the record required by RAP 10.3(4). For example, Stephens represents that "[m]ost obviously, the public has been harmed by the wrongful transfer of substantial amounts of money from individuals' pockets to the coffers of CCS and Omni and others" and that "a significant number of people . . . have been deceived, intimidated and/or coerced" even though there is nothing in the record to even remotely support such statements. Stephens' Br. at 2-3. Because these and a number of other inflammatory allegations in Stephens' brief are wholly inappropriate and lack factual support, they are to be disregarded by this Court.

Opening Brief with detailed citations to the record. Despite Stephens' protestation to the contrary, this case *is* about the chain of events that directly resulted from his refusal to provide proof of liability insurance following his automobile accident. Because Stephens failed to provide proof of insurance, CCS made reasonable efforts to obtain information about Stephens' insurer, if any, and only in the alternative sought reimbursement. Stephens cannot be permitted to deny this nexus for the purpose of feigning some type of nonexistent injustice.

In summary, Stephens was involved in an automobile accident, wherein he rear-ended an automobile insured by Omni Insurance Company ("Omni"). CP 68, 198. It is undisputed that Stephens was entirely at fault for the accident, as confirmed by licensed insurance adjusters representing both drivers as well as a confession of judgment executed by Stephens himself. CP 32-34, 198-99. Because Stephens failed to provide proof of insurance, Omni made payment to its insured for property damage and bodily injury under the uninsured motorist coverage. CP 68, 199. Thereafter, following well established claims processing procedures using licensed insurance adjusters, Omni adjusted the claim and made payment to the accident victim. CP 198-99. Following well established subrogation law, Omni and CCS asserted Omni's subrogation claim against Stephens in an effort to obtain

insurance information or, alternatively, reimbursement for sums paid on his behalf. CP 215-32.

Stephens paid Omni for the property damage portion of the claim. CP 216. In response to requests for reimbursement of the bodily injury portion of the claim, however, Stephens refused to pay. CP 385-87. Instead, it was later revealed that he actually did have insurance in effect at the time of the accident. CP 386. Thereafter, Stephens' insurer agreed with Omni as to allocation of fault to Stephens and promptly paid the full amount of Omni's bodily injury subrogation claim without any protest, thereby fully resolving this matter. CP 68, 386.

The CCS letters at issue in this case were not, as Stephens suggests, unfair or deceptive. They did not make claims that were untrue or unsupported. They were not sent to any law abiding and/or uninvolved members of the public. Stephens received the letters after 1) having caused automobile accident, 2) refusing to provide proof of liability insurance, 3) receiving numerous other pieces of correspondence from Omni relating to the automobile accident, and 4) making payment to Omni on the property damage (but not personal injury damage) portion of the subrogation claim.

Despite this actual factual scenario, Stephens has the audacity to ask this Court to render a legal ruling on the issue he characterizes as

follows: "This case concerns the deceptive and illegal means that corporations, if left unchecked, will employ to wrongfully extract money from the pockets of individuals in Washington, even though such persons lawfully owe the corporations nothing." Stephens' Br. at 1. The reality in this case is that Stephens was obligated to reimburse Omni for sums erroneously paid on his behalf under the uninsured motorist coverage. Thus, Stephens' description of the issue in this case is, at best, nothing more than a concocted version of events putting his claim of a "conspiracy" involving a "deceptive scheme" to "coerce" payment in the best possible (albeit inaccurate) light.[3]

III. ARGUMENT IN REPLY

A. This Court Must Reject Stephens' Argument That Pursuit of a Subrogation Claim is Only Allowed if a Judicial Determination Has Been Rendered.

The crux of Stephens' objection to the CCS letters is that they asserted a subrogation claim when no court judgment had been entered against him. He objects to the term "collection" and the phrase "amount due." Stephens also complains because he does not like the tone or the

[3] Washington courts are "not authorized to render advisory opinions or pronouncements upon abstract or speculative questions[.]" *Wash. State Republican Party v. Public Disclosure Comm'n*, 141 Wn.2d 245, 296, 4 P.3d 808 (2000) (quoting *Wash. Beauty College v. Huse*, 195 Wash. 160, 164-65, 80 P.2d 403 (1938)). To meet the requirements of justiciability, "the action must involve an actual as distinguished from a possible or potential dispute[.]" *Id.* (quoting *Huse*, 195 Wash. 164-65). Because the possible or potential dispute described in Stephens' briefing does not presently exist, this Court must decline to issue the requested ruling on the unsupportable version of the "facts" recited throughout Stephens' brief.

font used in the CCS letters. As discussed herein, Stephens has not and cannot demonstrate that the CCS letters were deceptive or that they had a capacity to receive any uninsured motorist who was involved in an accident. Consequently, Stephens' CPA claim (even if he did have standing to assert such a claim, which he does not) necessarily fails.

Stephens has not and cannot deny that the facts set forth in the CCS letters are *entirely truthful*. *See* CP 388-90. CCS is a collection services agency and does belong to the organizations referenced by seal on the letters. Nowhere on any one of the CCS letters does the word "debt" appear. Indeed, the claim was never characterized by CCS as a "debt."[4] Likewise, the claim was never characterized by CCS as a "court judgment." Indeed, there exists no rule or public policy that would require the filing of a formal lawsuit that must be fully prosecuted and reduced to judgment before a subrogation claim can be asserted, before a claimed sum can be pursued in collections, or before a specific amount can be characterized as being due.

Stephens, however, characterizes himself as if he "legally owed nothing" for the purpose of accusing CCS and Omni of falsely accusing him of a reimbursement obligation. By making this argument, Stephens insinuates that people cannot even be asked to remit payment unless

[4] Inexplicably, Stephens falsely accuses CCS of having characterized the subrogation claim as a "debt" repeatedly throughout his appellate brief.

there is a court judgment detailing a formal financial obligation. "Legally owing nothing," however, is a more accurate description of a person who has been adjudicated as having actually owed nothing. It is hardly a fair description of a person who has caused an automobile accident resulting in both property damage and personal injury. Because Stephens caused an automobile accident that resulted in these damages and injuries, he (or his insurer) most definitely owed money. In accordance with Washington uninsured motorist laws, the injured person's insurer (Omni) was obligated to make payments on Stephens' behalf to ensure that the victim was promptly made whole regardless of the at-fault driver's failure to follow the law. This certainly cannot be reasonably interpreted as the equivalent of Stephens "legally owing nothing."

To suggest that a court judgment is required in every case is utterly ridiculous, as it is contrary to notions of judicial economy and common sense. Indeed, if that were the rule, our court systems would be overburdened with lawsuits that could have been resolved through informal communications such as those used in this case. Moreover, it would be cost prohibitive to pursue valid claims in many instances.[5]

[5] Even counsel for Stephens concede that pursuit of litigation in every case is not feasible in a brief they submitted in the parallel *Panag v. Farmers and CCS* case, which has been linked to this instant case for the purposes of appeal. *See* Panag's Reply Br.

Considering that Washington law mandates that insurers must make payments on behalf of uninsured motorists and thereafter seek reimbursement, it would be those very law abiding insurers that would be unfairly penalized if such a system were adopted. At the same time, drivers who choose to drive without insurance would be inappropriately rewarded. As a practical consequence, the victim's insurer would face difficult barriers to asserting a claim to reimbursement relating to an automobile accident if this were the rule.

Although Stephens and his attorneys may not like the CCS letters, they have failed to demonstrate that the letters were unlawful in any way. In a brief submitted in the linked *Panag* case, counsel for Stephens suggests that subrogation claims can only be pursued by litigation or negotiating a resolution "without the use of deceit and misrepresentation." Panag Reply Br. (filed Apr. 28, 2006), at 27 n.51. This is *exactly* what was done in this case and in the *Panag* case, *i.e.*, letters were sent in pursuit of the subrogation claim and a resolution was ultimately negotiated, all without the use of deceit or misrepresentation.

Indeed, Stephens properly acknowledges that Omni has a subrogation right to seek reimbursement for sums paid. Likewise, Stephens has never argued that Stephens' use of CCS to recover those

(filed Apr. 28, 2006), at 27 ("Ms. Panag's position is not that subrogation claims can only be pursued through litigation[.]").

sums was inappropriate. The CCS letters sent to Stephens accurately detail a claim for reimbursement relating to an automobile accident that he caused. When Stephens finally submitted the claim to his insurer, his insurer promptly agreed with the liability determination that Stephens was entirely at fault and promptly paid the subrogation claim. Under these circumstances, Stephens' complaints about the CCS letters become nothing more than his subjective distaste for the phraseology, tone, and font. Stephens has not and cannot demonstrate that the CCS letters were deceptive or that they had a capacity to deceive any uninsured motorist who was involved in an accident and then received such a letter.

Because the record does not contain evidence sufficient to support any of the five elements of the CPA, Stephens' CPA claim (even if he did have standing to assert such a claim) necessarily fails.

B. This Court Must Reject Stephens' Effort to Circumvent Existing Washington Law and Invoke the Wholly Inapplicable Consumer Protection Act.

The conduct at issue in this case is governed by existing Washington law. Well established statutory schemes impose requirements and penalties on Washington drivers and automobile insurers: The Mandatory Liability Insurance Act, RCW 46.30, the Financial Responsibility Act, RCW 46.29, and Unfair Claims Settlement Practices, WAC § 284-30. These laws require that drivers carry and

provide proof of liability insurance; they require that automobile insurers make payment on behalf of uninsured motorists and then exercise their subrogated right to reimbursement; and they require that insurers follow mandatory claims processing regulations.

It is undisputed that Omni and CCS fully complied with the law. Stephens himself, on the other hand, failed to provide proof of insurance as he was required to do under Washington law. It was Stephens' own deliberate decision to violate the law[6] that set into motion a sequence of events that led to the issuance of the CCS letters that Stephens now complains about. Because the conduct of Omni and CCS was in full compliance with the applicable statutory schemes, Stephens is unable to assert a cause of action under any of the governing laws.

Faced with no case against Omni or CCS, Stephens must resort to asking this Court to rewrite the law to provide him with a remedy. In a desperate effort to insulate himself from liability properly attributed to him and to pursue a windfall of damages, Stephens is attempting to package his case against Omni and CCS as if it were a CPA cause of

[6] The record indicates that Stephens had insurance at the time he caused the automobile accident, but withheld that information from the accident victim, as well as her insurer (Omni) and its agent (CCS) despite numerous requests in violation of Washington law. For the first time in his appellate brief, Stephens asserts that "there was some question as to whether [he] head valid insurance coverage." Stephens' Br. at 2. There is no support for such an allegation in the record. Regardless, because it is illegal to drive without valid insurance coverage, Stephens violated the law either way.

action. It is not. The CPA simply does not apply to a non-consumer of services of the party allegedly in violation, particularly when that non-consumer seeks to escape a claim by his adversary in a subrogation context. As discussed at length in Stephens' Opening Brief and in the briefing submitted in the linked *Panag v. Farmers and CCS* case, at-fault uninsured motorists have no standing under the CPA to sue the victim's insurer or a collection agency seeking to recover sums on behalf of that insurer.

Because Stephens is not a consumer in his relationship with CCS and is unable to stand in the shoes of a consumer with regard to his allegations against CCS, existing law does not permit him to bring a CPA cause of action. The Legislature provided statutory schemes that strictly regulate the activities underlying this case. Omni and CCS complied with those statutes and regulations. This is the end of the inquiry. Stephens' request that this Court dramatically expand the CPA must be declined. Moreover, for the reasons articulated in CCS's briefing submitted in these *Stephens* and *Panag*[7] linked cases, all of the legal arguments relating to the CPA confirm that the CPA causes of

[7] CCS's *Panag* briefing is hereby expressly incorporated by reference.

action simply cannot be sustained in the context presented by these cases.[8]

This Court must therefore dismiss Stephens' CPA claim as a matter of law.

C. Even if This Court Were to Determine That CCS is Not Entitled to Judgment as a Matter of Law, Reversal and Remand are Required to Allow CCS to Take Discovery.

Alternatively, if and only if this Court should decide not to reverse the trial court's partial summary judgment order and dismiss Stephens' CPA claim as a matter of law, a remand is required to allow CCS to take discovery.

This Court must flatly reject Stephens' insincere efforts to characterize a discovery and motions timeline (which the parties initially agreed upon but thereafter failed to follow) as if it were a binding waiver of CCS's right to depose the plaintiff in this case. CP 121-35.[9]

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[8] The *res judicata* analysis set forth in Stephens' brief relies upon hyper-technicalities to urge this Court to overlook the common sense injustice of allowing Stephens to now disavow his prior liability admission. He simply cannot be permitted to take directly contrary positions with impunity. Simply put, because Stephens had already admitted he was liable for the accident, he absolutely could not have been deceived when he received the claim letters relating to that very same accident.

[9] Included in this schedule was a timeline for the parties' depositions (CCS's on June 22, 2005, and then Stephens' on July 6, 2005), as well as an August 12, 2005 date for a hearing on motions for summary judgment. CP 131-32. For a number of reasons, the parties' depositions did not take place as scheduled. In fact, no parties were deposed prior to entry of the underlying order that is at issue in this appeal. Likewise, no summary judgment hearing was held on the date prescribed in the agreed timeline. Thus, the relevant deadlines were universally disregarded by both parties and, as such, were rendered irrelevant. *See, e.g.*, CP 105. The parties were actually in the process of

Moreover, Stephens' own unilateral assurance that additional discovery "is unlikely to materially change these facts" is certainly no basis upon which to deny CCS its right to test Stephens' evidence prior to the entry of any potentially adverse ruling. *See* Stephens' Brief, at 59.

The only evidence considered by the trial court on the injury and damages CPA elements was Stephens' own self-serving declaration. CP 67-83. CCS is entitled to test the evidence proffered by the plaintiff and ascertain for itself the credibility and veracity of that evidence. The trial court erred by refusing to allow CCS to take Stephens' deposition, and then entering a ruling adverse to CCS.

As explained in CCS's Opening Brief, if this Court were to determine that Stephens has standing to sue CCS under the CPA and that CCS is not entitled to dismissal of Stephens' claims, this Court must reverse and remand to allow CCS to take discovery on the CPA elements.

IV. CONCLUSION

Existing law and public policy require this Court to flatly reject the unlimited expansion of the CPA proposed by Stephens. He is not a consumer in his relationship with Omni or CCS, and cannot stand in the shoes of a consumer. He therefore has no standing to assert a CPA claim

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negotiating a revised timeline when the trial court entered a stay of proceedings pending appellate review. CP 784.

in this case. Indeed, the interests of Washington consumers would not be served if their statute were dramatically altered to provide a windfall to uninsured motorists who are decidedly *not* consumers of insurance.

Moreover, the claim letters at issue in this case were not unfair or deceptive. To the contrary, they are *entirely truthful* and were sent to Stephens to obtain reimbursement for sums paid on his behalf. In accordance with Washington insurance laws, insurers such as Omni are obligated to make payments on behalf of uninsured motorists who cause automobile accidents. Thereafter, such insurers have a subrogation right to seek recovery of payments made. If the relief sought by Stephens were granted, recovery would be effectively barred. This is contrary to well established subrogation law, as well as public policy that encourages compliance with Washington's mandatory insurance laws.

For the reasons discussed herein and in CCS' Opening Brief, this Court must reverse the trial court's partial summary judgment order and dismiss Stephens CPA claim as a matter of law. Alternatively, this Court must reverse the trial court's order and remand to allow CCS to take discovery.

DATED: May 19, 2006

COZEN O'CONNOR

By: _____
John A. Granger,
WSBA No. 6794
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Attorneys for
Credit Control Services, Inc.

DECLARATION OF SERVICE

Melissa O'Loughlin White states:

I am a citizen of the United States of America and a resident of the State of Washington, I am over the age of 21 years, I am not a party to this action, and I am competent to be a witness herein.

On this 19th day of May, 2006, I caused to be filed via U.S. Mail, First Class Postage prepaid, with the Court of Appeals of the State of Washington, Division I, the foregoing reply BRIEF OF APPELLANT CREDIT CONTROL SERVICES, INC. I also served copies of said document on the following parties as indicated below:

Parties Served	**Manner of Service**
Counsel for Plaintiff: Matthew J. Ide Ide Law Offices 801 Second Avenue, Suite 1502 Seattle, WA 98104-1500	( ) Via Legal Messenger ( ) Via Overnight Courier ( ) Via Facsimile (X) Via U.S. Mail
Counsel for Plaintiff: Murray T. S. Lewis Lewis Law Firm 600 First Avenue, Suite 409 Seattle, WA 98104-2216	( ) Via Legal Messenger ( ) Via Overnight Courier ( ) Via Facsimile (X) Via U.S. Mail
Counsel for Defendant Omni: Shawnmarie Yates Bullivant Houser Bailey PC 1601 Fifth Avenue, Suite 2300 Seattle, WA 98101-1618	( ) Via Legal Messenger ( ) Via Overnight Courier ( ) Via Facsimile (X) Via U.S. Mail

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Seattle, Washington, this 19th day of May, 2006.

Melissa O'Loughlin White

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